

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)	
)	
Unbundled Access to Network)	WC Docket No. 04-313
Elements)	
)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local)	CC Docket No. 01-338
Exchange Carriers)	
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**REPLY TO OPPOSITIONS TO PETITION FOR PARTIAL RECONSIDERATION
OF
THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL,
DATANET SYSTEMS, LLC,
ERNEST COMMUNICATIONS, INC.,
NAVIGATOR TELECOMMUNICATIONS, LLC,
NII COMMUNICATIONS,
NY TELSAVE, and
SYMTELCO, LLC**

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SUMMARY

In this reply, the Payphone Commenters respond to the arguments raised by Verizon, SBC, and BellSouth against their Petition for Partial Reconsideration. The Petition seeks reconsideration of the Commission's determination that CLECs are not impaired without access to unbundled switching (and thus UNE-P) for serving payphones, and thus that no unbundling is required. The Petition demonstrated that the PSP market is distinct from the mass market and that CLECs serving the PSP market are impaired without access to unbundled switching. As the Payphone Commenters demonstrated, the need to treat PSPs as a distinct market segment and the impairment in serving that market stem from the same basic fact: unlike even low-income mass market customers, PSPs cannot and do not make use of vertical features, broadband, or any other revenue-enhancing services other than basic dial tone. Accordingly, CLECs seeking to serve the payphone market through self-provisioned switching cannot generate enough revenue to cover their costs. The Petition also demonstrated that the Commission must consider Section 276's mandate that it ensure the "widespread deployment" of payphones under the "at a minimum" standard of Section 251(d)(2) as a factor supporting unbundling.

The BOCs raise four arguments against the Petition, all of which are without merit. First, the BOCs argue that the Commission cannot consider the statutory goals of Section 276 of the Act as a factor supporting unbundling under the "at a minimum" standard. According to the BOCs, the "at a minimum" standard only permits consideration of statutory that weight against unbundling. However, the courts and the Commission itself have made no such distinction. The Commission's unbundling analysis must be "rationally related" to the other purposes of the Act, which, as the

Commission has acknowledged, requires consideration of *all* relevant statutory considerations, not merely those militating against unbundling.

Second, the BOCs argue that the Commission's finding that requiring unbundling of mass market switching would create a disincentive to investment in facilities is dispositive in their favor. What the BOCs ignore, however, is that the Payphone Commenters have demonstrated that it is not economically viable to provide switch-based service to PSPs, even where a CLEC is otherwise using the switch to serve customers, and the cost of the switch is treated as sunk. Given that switch-based service to PSPs is not viable, no CLEC could be disincentivized from proceeding with the deployment of its own switching facilities by making unbundled switching available to serve PSPs. Third, the BOCs argue that PSPs are no different than low-income mass market customers and thus do not constitute a discrete market requiring an independent impairment analysis. The BOCs are wrong for at least four reasons: (1) unlike mass market customers, PSPs are identified as a protected class by Section 276, which requires that the Commission ensure the "widespread deployment" of payphones; (2) unlike mass market customers, PSPs are a business whose chief input is local exchange service, a fact which the BOCs themselves acknowledge by treating payphone lines as a special class of service in their retail tariffs and in their interconnection and commercial wholesale agreements; (3) while low-income mass market customers might choose not to avail themselves of vertical features or broadband, PSPs do not and cannot make use of either; and (4) there are additional costs inherent in providing the features and functionality required in serving PSPs, including Flex ANI call blocking and screening.

Fourth, the BOCs attack both the revenue and cost data used by the Payphone Commenters, as well as the Payphone Commenters' comparison of the two data sets. The revenue data, however, constitutes the best data available and accurately reflects the revenues available from a payphone line. It consists of the aggregated revenues per line of three CLECs serving over 100,000 independent payphone lines across 20 states, representing 20-25% of all independent PSP lines. The cost data was taken directly from SBC and BellSouth filings and was used in exactly the same way as it was used by the BOCs. Not surprisingly given that it is their own data, while the BOCs complain that the data dates to 2003 and complain that it is not rigorous, they do not point to a single deficiency. As for the Payphone Commenters' comparison of the revenue and cost datasets, which the BOCs claim are mismatched, as shown below, the two sets represent a 91.6% overlap.

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The American Public Communications Council), Ernest Communications, Inc., Navigator Telecommunications, LLC, Nii Communications, NY Telsave, and Symtelco, LLC (collectively, "Payphone Commenters") hereby files its consolidated reply¹ to the oppositions to their Petition for Partial Reconsideration ("Petition") of the *TRO Remand Order*,² filed by Verizon,³ BellSouth,⁴ and SBC.⁵

INTRODUCTION

The Petition sought reconsideration of the Commission's finding in the *TRO Remand Order* that CLECs are not impaired without access to unbundled switching when seeking to provide local service to payphone service providers ("PSPs"). The Payphone Commenters demonstrated that the market for providing local services to PSPs is distinct from the mass market,⁶ and that CLECs serving the PSP market are impaired without access to unbundled switching. As the Payphone Commenters demonstrated, the need to treat PSPs as a distinct market segment and the impairment

(Footnote continued)

¹ This consolidated reply is within the page limit that would have applied to replies to three separate oppositions and is thus consistent with 47 C.F.R. § 1.429(g). To the extent, however, that the Commission believes that a waiver of 47 C.F.R. § 1.429(g) is necessary, the Payphone Commenters hereby so request.

² *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533 (2004).

³ Response of Verizon to Petitions for Reconsideration, WC Docket 04-313 (June 6, 2005) ("Verizon Opp.")

⁴ Consolidated Response of BellSouth Corporation to Petitions for Reconsideration and Clarification, WC Docket 04-313 (June 6, 2005) ("BellSouth Opp.").

⁵ Response of SBC Communications, Inc. to Petitions for Clarification and/or Reconsideration, WC Docket 04-313 (June 6, 2005) ("SBC Opp.").

⁶ The Payphone Commenters also demonstrated that the PSP market is distinct from the enterprise market. *See* Comments of the Payphone Commenters, WC Docket 04-313, at 14-15 (Oct. 4, 2004) ("Comments"); Reply Comments of the Payphone Commenters, WC Docket 04-313, at 7-8 (Oct. 19, 2004) ("Reply Comments"). Since the *TRO Remand Order's* discussion of the PSP market did not address the Payphone Commenters' showings with respect to the enterprise market, the Petition focused on the Commission's failure to draw a distinction between the PSP market and the mass market. *See* Petition at 2 n.2.

in serving that market stem from the same basic fact: unlike even low-income mass market customers, PSPs cannot and do not make use of vertical features, broadband, or any other revenue-enhancing services other than basic dial tone. Accordingly, CLECs seeking to serve the payphone market through self-provisioned switching cannot generate enough revenue to cover their costs. The Payphone Commenters showed that this is true not just for CLECs with a PSP-focused business plan, but for all CLECs. Even if a CLEC is able to economically provide switch-based service to other market segments, and the cost of the switch and associated facilities is treated as sunk, it is still not possible to viably enter the PSP market because of the constrained revenue opportunity.⁷ Based on this showing, the Payphone Commenters sought a preservation of unbundled switching (and thus UNE-P) for serving the PSP market, regardless of whether the Commission found impairment with respect to the mass market.

DISCUSSION

I. THE COMMISSION WAS BOUND TO CONSIDER SECTION 276

As demonstrated in the Petition, the Commission was obligated to consider its statutory mandate under Section 276 of the Communications Act, 47 U.S.C. § 276 to ensure “payphone competition and the widespread deployment of payphone[s]” in assessing whether to require UNE-P for serving PSPs. As the Payphone Commenters explained, in making its unbundling determination under the “at a minimum” standard of Section 251(d)(2), 47 U.S.C. § 251(d)(2), the Commission must consider its mandate

⁷ See Petition at 7-8; Reply Comments at 12-16; Letter from Jacob S. Farber, counsel to Payphone Commenters, to Matt Brill, Sr. Legal Advisor to Commissioner Abernathy, WD Docket 04-313 (Dec. 8, 2004) (“December 8, 2004 Ex Parte”).

under Section 276 in addition to the impairment criteria. Even in the absence of a finding of complete impairment,⁸ the Commission can and should require unbundled switching for service to PSPs in order to advance the goals of Section 276. *See* Reply Comments at 5-6.^{9 10}

In attacking the Payphone Commenters' demonstration that the "at a minimum" standard requires the Commission to weigh Section 276 as a factor favoring unbundling, the BOCs agree that the Commission can rely on the "at a minimum" language to justify giving effect to other statutory provisions in considering whether to

⁸ To be clear, as demonstrated below and in the Petition, CLECs *are* impaired with respect to the payphone market without access to unbundled switching, and the Commission must so find. If, however, the Commission nevertheless finds that CLECs are not completely impaired with respect to serving PSPs, then it must weigh Section 276 as an additional factor supporting unbundling, and can and should order unbundling even in the absence of complete impairment.

⁹ The Payphone Commenters also demonstrated that Section 276 comes into play in the unbundling analysis at a second level. In addition to being a factor that the Commission must weigh in *addition to* impairment in deciding whether unbundling is required, Section 276 also bears directly *on* the Commission's analysis of whether impairment exists. *Cf. USTA v. FCC*, 359 F.3d 554, 572 (D.C. Cir. 2004) ("*USTA II*") (noting that the Commission factor into its impairment analysis other statutory goals by "craft[ing] a standard of impairment that buil[ds] in" consideration of other goals). In light of the goals of Section 276, the Commission may and should find impairment based on a lesser showing than might otherwise be required with respect to other market segments not recognized as a special class under the Act. At the very least, the Commission must resolve any uncertainties in favor of finding CLECs impaired in providing local service to PSPs without access to unbundled switching. *See* Reply Comments at 6-7.

¹⁰ In any event, as demonstrated below and in the Petition, CLECs *are* impaired with respect to the payphone market without access to unbundled switching.

require unbundling.¹¹ The BOCs, however, contend that the Commission's "at a minimum" authority is limited to consideration of factors that support its decision not to unbundle various elements. In the BOCs' view, Commission cannot consider factors that, like Section 276, militate in favor, rather than against, requiring unbundling.

As the Payphone Commenters demonstrated at length in the Petition, however, that distinction is irrelevant under the courts' interpretation of the "at a minimum" standard. *See* Petition at 15-19.¹² In reviewing in Section 251, the courts have repeatedly stressed that the Commission's impairment analysis and unbundling rules must be "rationally related to the goals of the Act." *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 388 (1999); *USTA v. FCC*, 290 F. 3d 415, 428 (D.C. Cir. 2002) ("*USTA I*"); *USTA II*, 359 F.3d at 562-63. As the D.C. Circuit found, this requires a "balanc[ing]" of the costs and benefits of unbundling with other considerations relevant to the Act. *See USTA II* at 562-63. While the Court had before it a balancing of the need for unbundling with

¹¹ The BOCs' fail to address the Payphone Commenters' argument concerning the second level at which Section 276 factors into the unbundling analysis, i.e. that the Commission must weigh Section 276 in determining whether there is impairment itself. *See* n.8 above. Instead, the BOCs' focus exclusively on the Payphone Commenters' showing that, under the "at a minimum" standard, the Commission must weigh Section 276 as a factor favoring unbundling separate and apart from its impairment determination. Since the BOCs did not address the role of Section 276 in the impairment analysis itself, and instead addressed only the role of Section 276 under the "at a minimum" standard, the discussion that follows this footnote focuses on the "at a minimum" standard. However, the essence of the Payphone Commenters' analysis—that Section 276 is a factor that the Commission must weigh in favor of unbundling—applies with equal force to both tiers of the Payphone Commenters' argument.

¹² The discussion in the text following this footnote summarizes the Petition's showing. That showing, in its entirety, is hereby incorporated herein.

factors that militate against unbundling, the "rationally related" analysis applies with no less force to statutory factors that weigh in favor of unbundling.

The Commission itself has specifically "reject[ed]" arguments that the Commission can only use the 'at a minimum' language to decline to unbundle despite impairment" *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 174 (2003) ("*Triennial Review Order*"). Rather, the Commission found that the "at a minimum" language permits it "to make unbundling determinations in light of the Act's many and conflicting goals, not just goals that would limit incumbent LECs' unbundling obligations." *Id.*; see also *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 101 (1999).

The BOCs are thus simply wrong in contending that "the Commission may not order unbundling without a finding of impairment." SBC Opp. at 33; see Verizon Opp. at 31. While the Payphone Commenters would agree that "Congress made impairment the 'touchstone' of unbundling," SBC Opp. at 33 (quoting *USTA I*, 290 F.3d at 425), if impairment were the only factor that Congress intended the Commission to consider, it would not have directed the Commission to consider impairment "at a minimum." Instead, as the Supreme Court said in *Iowa Utilities Bd.*, Section 251(d)(2) more generally "[r]equires the Commission to determine on a rational basis which network elements

must be made available, taking into account the objectives of the Act and giving some substance to the ‘necessary’ and ‘impair’ requirements.” 525 U.S. at 391-92.¹³

In support of the proposition that impairment is a necessary prerequisite for requiring unbundling, Verizon cites *USTA II*, 359 F.3d at 579-80. The D.C. Circuit did not, however, have in front of it, and did not rule on, the question of whether the Commission could order unbundling absent a finding of impairment. Instead, the court was addressing the CLECs’ argument that the Commission could not consider under its “at a minimum” authority statutory factors—in that case Section 706—that militate against unbundling. In that context, the CLECs argued that the “at a minimum” language can only be used to *support* requiring unbundling. While the *USTA II* court declined to adopt the CLEC view that “at a minimum” can *only* be used to weigh other provisions of the act in favor of unbundling, the court did *not* say that “at a minimum” can never be used in support of unbundling. *Id.* at 579-80.

BellSouth’s attempt to distinguish between Sections 706 and 276 on the basis that Section 706 is “deregulatory” while Section 276 is “regulatory” is baseless. See BellSouth Opp. at 47. Leaving aside the question of just what exactly constitutes a “regulatory,” as opposed to a “deregulatory” statutory provision, neither Section 251(d)(2) nor the courts make any such distinction. Rather, the Commission’s unbundling rules must be “rationally related to the goals of the Act.” *Iowa Utilities Bd.*,

¹³ SBC’s citation to this same portion of the Court’s opinion as well as to pp. 388-89 and 397 in support of its argument is confused. The cited passages address the Commission’s interpretation of the impairment standard itself, not the relationship between that standard and the “at a minimum” standard. Nowhere on those pages (nor anywhere else in the opinion) does the Court state or imply that impairment is a necessary prerequisite to unbundling.

525 U.S. at 388. Accordingly, there is no basis for treating Section 276's mandate of widespread payphone deployment any differently than Section 706's goal of encouraging the widespread deployment of advanced services under the "at a minimum" standard.

Thus, while the Commission certainly should (indeed, must), as BellSouth and SBC suggest, pursue the goals of Section 276 directly, *see* BellSouth Opp. at 47; SBC Opp. at 33, doing so does not obviate the Commission's obligation to also factor Section 276 into its unbundling analysis. Indeed, given the BOCs' failure to comply with several of the measures taken by the Commission under its Section 276 authority, advancement of Section 276's goals in the context of the Commission's unbundling analysis is even more critical. For example, BellSouth points out that the Commission sought to "assure payphone providers that they may purchase intrastate lines at rates that comply with the federal "new services test.'" BellSouth Opp. at 47. The BOCs, however, have resisted bringing their rates into compliance, have yet to do so in many states, and are continuing to resist their obligations. In light of that failure, the Commission must require the BOCs to unbundle switching, and thus permit other carriers to serve PSPs at cost-based rates where the BOCs have ignored their obligation to do so.

II. THE COMMISSION SHOULD REJECT THE BOCs' ARGUMENT THAT REQUIRING UNBUNDLED SWITCHING TO SERVE PSPS WILL CREATE A DISINCENTIVE TO INVESTMENT

Related to the BOCs' argument that the Commission should not consider Section 276 under its "at a minimum" authority is the BOCs' contention that the Commission *must* consider whether the availability of unbundled switching would create a

disincentive to investment in facilities. SBC cites the Commission's concern that the availability of unbundled mass market switching both discourages CLECs from deploying new facilities and creates disincentives for CLECs to use their already-deployed switches. *See* SBC Comments at 29. SBC then goes on to quote the Commission's determination that, in light of that disincentive effect, "'even if some limited impairment might exist in some markets, we would decline to require unbundling of mass-market local circuit switching pursuant to our 'at a minimum' authority.'" SBC Comments at 30 (quoting *Triennial Review Order* ¶ 218). According to this SBC, those "determinations are more than sufficient to mandate denial of [the Payphone Commenters] request, and [their] failure to challenge them here is dispositive of [their] petition for reconsideration." *Id.*

SBC is wrong on both counts. The Payphone Commenters *did* address the Commission's concerns regarding disincentivizing facilities investment in their reply comments, *see* Reply Comments at 6 n.8, and that showing demonstrated why it is not a relevant consideration. As the Payphone Commenters explained, "payphones cannot be effectively served by broadband; therefore, preserving CLECs' ability to serve PSPs with [unbundled local switching] will not have any effect on broadband investment incentives." *Id.* More generally, the entirety of the Payphone Commenters' analysis makes clear why the Commission's concerns about creating a disincentive to facilities investment, broadband or otherwise, are not relevant in the PSP market. As the Payphone Commenters demonstrated in their reply comments and in the Petition, PSPs cannot economically serve PSPs through self-provisioned switching *even if the CLEC has already deployed a switch and is viably serving other customers off the switch.* *See* Reply Comments at 12-16; December 8, 2004 Ex Parte at 1; Petition at 7-8. Therefore, no CLEC

could be disincentivized from proceeding with the deployment of its own switching facilities by making unbundled switching available to serve PSPs for the simple reason that without access to unbundled switching, the CLEC simply could not and would not serve its PSP customers. This is all the more the case now that the Commission has eliminated unbundled switching for the mass market.

III. PSPS ARE A DISTINCT MARKET UNDER THE COMMISSION'S IMPAIRMENT ANALYSIS

The BOCs challenge the Payphone Commenters' showing that PSPs represent a distinct market segment that must be analyzed separately from the mass market. According to the BOCs, PSPs are no more a distinct market than any low revenue mass market customer, such as "grandmothers," Verizon Opp. at 32, or "single-person households," SBC Opp. at 31.

This view of the mass market is strikingly at odds with the one presented by the BOCs in their comments in the *TRO Remand Order* proceeding. There, the BOCs strove to paint the mass market as characterized by a large and ever-increasing demand for multimedia bundles of voice and data services that can and are being delivered over broadband connections like cable television networks, DSL, and even wireless service. *See e.g.*, Comments of Verizon, WC Docket 04-313, at 85-101 (Oct. 4, 2004) ("Verizon Comments"); RBOC UNE Fact Report at I-2-6. The BOCs also contended that within the mass market there is an increasing demand for wireless service for both mobile and fixed residential telephone service. *See, e.g.* Verizon Comments at 101-03. In their reply comments, the Payphone Commenters explained why PSPs are not part of the BOCs' broadband-centric, intermodal mass market. Payphones require only—and can only make use of—a POTS link to the network and neither require nor benefit from Internet

access or other broadband capabilities. Similarly, PSPs do not need or benefit from mobile service at all—payphones are installed at fixed locations and do not move. *See* Reply Comments at 8-9.

Now, faced with the Payphone Commenters' showing that the PSP market is distinct from the mass market, the BOCs are forced to talk out of both sides of their mouths. While they continue to maintain that the mass market is characterized by high levels of broadband usage and intermodal competition as they previously argued, *see* Verizon Opp. at 30, at the same time (and inconsistently) they also point to several different classes of low revenue consumers as being typical of the mass market. The BOCs cannot have it both ways. Either the mass market is characterized by rapidly growing broadband penetration and VoIP and wireless entry, *see* Verizon Opp. at 30, *or* it is characterized by low revenue POTS consumers, *see id.* at 32.¹⁴

In any case, however, there are very real distinctions between low income mass market customers and PSPs. First, PSPs are specifically identified as a protected class by Section 276. This fact alone distinguishes PSPs from the mass market and requires individualized treatment to ensure that Section 276's goal of the widespread deployment of payphones is met.

¹⁴ Verizon's assertion that "[t]he payphone business . . . is declining precisely because of intermodal competition—namely, wireless service," Verizon Opp. at 31, is particularly galling. It is, in essence, Verizon, the nation's largest wireless carrier, telling the Commission that it should not worry about the declining base of payphones—a competing service offering—because Verizon will be there to serve callers instead. Aside being blatantly self-serving, Verizon also ignores the fact that if payphones are no longer available, the substantial percentage of Americans who are not fortunate enough to have a wireless phone will have no access to the public network when away from home or work.

Second, unlike residential customers, PSPs are a business whose chief input and most significant cost is the local exchange service they receive from their local provider. Moreover, that local service is specifically tailored to their needs. PSPs order a specialized class of service, with a unique set of features and functionally associated with the line. The BOCs themselves have treated PSPs as a distinct customer class since they were first required to offer payphone service to independent PSPs in 1984. All of the BOCs' tariffs reflect a specialized class of service for PSPs and the BOCs require PSPs to order specialized lines, known as PAL (for Public Access Lines) or COCOT (Customer Owned Coin Operated Telephone) lines.¹⁵

In addition to their retail tariffs, the BOCs' interconnection agreements (at least prior to the elimination of UNE-P) contained discrete service codes, terms, and rates for the UNEs comprising payphone lines. In many cases, the BOCs unjustifiably charged more for payphone line UNEs, either through an upfront charge (as was the case in SBC's Ameritech region), or through additional per-line charges (as was the case with SBC in California). The commercial agreements that the BOCs are now offering as replacements for their interconnection agreements continue to differentiate between the network elements necessary for general local exchange service and the network elements associated with payphone lines. In point of fact, at least one BOC, SBC, refuses to make the network elements necessary to serve payphone lines available under its interim UNE-P replacement commercial agreement. *See* SBC's Commercial

¹⁵ *See, e.g.* Verizon Washington, DC Inc., Local Exchange Services Tariff, P.S.C.-D.C.-No. 202, Section 4D (specifying regulations for Pay Telephone Lines).

Agreement For Interim UNE-P Replacement, § 2.3 (excluding payphone lines from the scope of the offering).¹⁶

Third, unlike low income mass market customers who could, but in some instances may choose not to, avail themselves of revenue-producing vertical features and bundled Internet access, PSPs do not and cannot make use of those service elements. As discussed above, PSPs require only a POTS connection to the network, which they functionally resell to their caller customers. Since neither PSPs nor their customers can take advantage of vertical features or Internet access, no PSP would ever order such services. Thus, while CLECs may in some instances have difficulty generating additional revenue from certain mass market customers, they are altogether precluded from recovering additional revenue from PSPs.

Fourth, not only do CLECs serving PSPs generate less revenue than CLECs serving the typical mass market customer, they also bear increased costs. As the Payphone Commenters explained in their comments, in order to serve PSPs, CLECs need to upgrade their switches to provide a variety of features essential to PSPs, including call blocking and screening functionality. *See* Comments at 24. In addition, CLECs must also ensure that their switches can provide Flex ANI, a feature that generates software-defined ANI ii coding digits that identify payphone lines. *See* Comments at 24-25. In the aggregate, these costs can add significantly to the cost of providing self-provisioned switching. *Id.* SBC has recently sought to use the costs of providing payphone service as the basis for its recently-filed request with the California Public Utilities Commission seeking a 60% increase in SBC's retail payphone line rates.

¹⁶ The agreement is available online at https://clec.sbc.com/clec_documents/unrestr//clec/cars/unrestr/public/interim/Interim%20UNE-P%20Repl.doc.

While SBC's request grossly overstates its costs and is completely unjustifiable, it underscores that PSPs are a distinct customer class. Because PSPs—unlike mass market customers—cannot be sold services other than basic dial-tone, the only way to increase the revenues available for a payphone line is to increase rates. This distinction between PSPs and mass market customers is brought into even starker relief by the fact that at the same time SBC is seeking to increase its retail payphone line rates, SBC is *reducing* its basic mass market local exchange rates. Faced with competition for mass market customers, SBC knows that it can reduce rates to the levels necessary to retain or winback those customers and then up-migrate them to higher levels of service. By contrast, in the absence of competition for service to PSPs, and given the inability to derive additional revenue from PSPs, SBC is behaving rationally (from its perspective) in increasing payphone line rates.

In addition to arguing that PSPs are no different for impairment purposes than low income mass market customers, the BOCs also more generally fault the Payphone Commenters for focusing on “one narrow segment of the market,” SBC Opp. at 31, instead of the mass market as a whole. That, however, is *exactly* what is required under the Commission's granular impairment analysis. The Commission not only *can* but *must* examine discrete market segments when they “vary decisively” in relationship to the impairment criteria. *USTA II* at 570. The Payphone Commenters demonstrated that the PSP market is such a distinct market. Thus, not only was a PSP-focused impairment analysis permissible, it was required.

In a related vein, SBC also faults the Payphone Commenters for assuming that CLECs “are entitled to a profit when serving [PSPs].” SBC Opp. in 30. In SBC's view, “reasonably efficient CLECs enter markets with the goal of “providing the full range of

services . . . to all customers supported by the marketplace.’ And in doing so, no carrier is entitled to a profit on each and every type of customer it serves.” SBC Opp. at 30 (quoting *TRO Remand Order* ¶ 25; internal citations omitted).

This argument is nothing short of preposterous. No rationale carrier—SBC and the other BOCs included—serves unprofitable customers. As the Payphone Commenters demonstrated, even those CLECs who may be capable of serving the mass market with self-provisioned switching cannot economically serve PSPs with those same switches. Thus, without access to unbundled switching, CLECs simply will not serve PSPs.

This is not just a theoretical contention, it reflects marketplace realities. As the Payphone Commenters explained in the Petition, during the period prior to the adoption of the *CLEC Access Charge Benchmarking Order*,¹⁷ when available revenues were considerably higher, some switch-based CLECs did enter the PSP market. All of those CLECs are now bankrupt or have exited the market, or are providing only a *de minimis* level of service as a holdover from the pre-benchmarking days. Petition at 14-15. So far as the Payphone Commenters are aware, no CLEC has introduced switch-based service to PSPs since the access benchmarking order took effect.¹⁸

¹⁷ *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001).

¹⁸ Verizon takes the fact that there may be some *de minimis* level of switch-based service that remains as a hold-over from CLEC entry pre-dating CLEC access charge benchmarking as proof that CLECs will, going-forward, serve PSPs with self-provisioned switching. Verizon Opp. at 33. This is a complete distortion of the facts and ignores the reality that CLECs are simply not offering service to PSPs.

BellSouth for its part mischaracterizes the nature of the Payphone Commenters' showing. The Payphone Commenters did not, as BellSouth would have it, ask the Commission to "evaluate a requesting carrier's impairment with reference to that carrier's particular business strategy" BellSouth Opp. at 45. Rather, as the Petition made clear, the Payphone Commenters showing demonstrated that *any* requesting carrier would be unable to serve a particular segment of the market—payphone providers—even assuming it was serving the mass market. Thus, instead of focusing impermissibly on a particular CLEC business plan, the Payphone Commenters engaged in precisely the analysis required of them (and the Commission) under the impairment analysis mandated by the courts, by focusing on a discrete market that "varies decisively" from the mass market.

IV. THE DATA PROVIDED BY THE PAYPHONE COMMENTERS FULLY SUPPORTS A FINDING OF IMPAIRMENT

The BOCs also fault the data relied upon by the Payphone Commenters. To demonstrate that CLECs cannot economically serve PSPs with their own switches, the Payphone Commenters compared the cost of providing such service with the limited revenue available from PSP customers. The BOCs attack both the revenue and cost data used by the Payphone Commenters, as well as the Payphone Commenters' comparison of the two data sets. As shown below, however, all of the BOCs' arguments are without merit.

A. The Revenue Data Produced By The Payphone Commenters Accurately Reflects the Revenues Available From A Payphone Line

The BOCs contend that the Payphone Commenters' revenue data is unreliable and characterize it as "three CLECs apparently self-reporting in response to an APCC-

generated information request.” BellSouth Opp. at 45. Aside from the pejorative tone, this is an accurate description but, instead of somehow damning the Payphone Commenters’ data, reflects an information collection process completely typical of data collection in rulemaking proceedings, including the BOCs’ own.¹⁹ Given that there was no publicly-available revenue data for CLECs serving payphones, the Payphone Commenters turned to the only available source of such data, the CLECs themselves. As explained in the Petition, the revenue data collected by the Payphone Commenters reflected the aggregated revenues per payphone line reported by three CLECs serving more than 100,000 payphone lines across 20 states. *See* Reply Comments at 10 n.12. Those 100,000 payphone lines represent 20-25% of all independent payphones and perhaps as much as half or more of the independent payphone lines served by CLECs. It thus hardly constitutes a limited sample.

Moreover, additional revenue data presented by the Payphone Commenters (and ignored by the BOCs) both corroborates the \$22.44 per line revenue data used by the Payphone Commenters and makes clear that it is in a highly conservative figure. In their reply comments, the Payphone Commenters supplied revenue data consisting of the average monthly bill, per payphone line, as reported by three PSPs who subscribe to more than 25,000 UNE-P-served payphone lines in 10 states. *See* Reply Comments at 10 n.12. That figure of \$18.16 is more than four dollars less than the more conservative

¹⁹ *See, e.g. Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (1999) (relying on data collected by the RBOC Payphone Coalition from its members and submitted by the coalition in setting the default dial-around compensation rate).

figure used by the Payphone Commenters as the basis of their impairment analysis. If anything, the analysis thus understated the actual level of impairment.

B. The Payphone Commenters Properly Relied On The BOCs' Own Cost Data, Which Was The Best Cost Data Available

The BOCs' criticism of the Payphone Commenters' cost data is even less persuasive. The cost data used by the Payphone Commenters was taken directly from two analyses in the *Triennial Review Order* record—one prepared by BellSouth²⁰ and one prepared by SBC²¹—that purported to demonstrate that CLECs are not impaired in serving the typical mass market customer. In both cases, the cost figure used by the BOC is the total monthly CLEC cost of serving a mass market customer, including SG&A and operating expenses. See BellSouth Impairment Analysis at 2, 7; SBC Impairment Analysis, Att. 3 at 2-7. Both BellSouth and SBC subtracted their respective cost figures from what they contended were typical revenue figures for a mass market customer to demonstrate that a switch-based CLEC serving such customers would have a positive net margin (and thus is not impaired). The Payphone Commenters used the exact same cost figures in exactly the same way, with the only difference being that the cost figures were compared to the revenue available from a PSP line instead of a typical

²⁰ See BellSouth Corporation, "CLECs Not Impacted in Using UNE Loops to Compete," enclosed with Letter to Marlene H. Dortch from Glenn T. Reynolds, Vice President-Federal Regulatory, BellSouth, in WC Docket No. 01-388 (January 30, 2003) ("BellSouth Impairment Analysis") (attached to Reply Comments).

²¹ See Letter to Chairman Michael Powell from James C. Smith, Senior Vice President, SBC Telecommunications, Inc., CC Docket No. 01-388 (January 14, 2003) and enclosed documents ("SBC Impairment Analysis") (attached to Reply Comments).

mass market line.²² That analysis resulted in a significant negative net margin (and therefore demonstrated impairment) with respect to both the BellSouth and SBC cost data.

Despite having presented the data themselves and despite having used it in precisely the same way as the Payphone Commenters, the BOCs complain that the cost data is inadequate. Not surprisingly given that it is their own data, however, none of the BOCs identify any particular shortcomings in the cost data. Rather, the BOCs can only point to the fact that the data is taken from ex parte filings that date to 2003 and imply that the data is therefore no longer valid. *See* BellSouth Opp. at 46; SBC Opp. at 31.

The BOCs' conclusory assertions that the cost data "lacks . . . vigor and reliability," BellSouth Opp. at 46, must be accorded no weight. Not only do the BOCs fail to point to so much as a single concrete shortcoming in the data, they cannot fault it without being obligated to come forward with what they regard as better data--especially since it was their data in the first instance. Moreover, it is not clear what other data the Payphone Commenters could have produced that the BOCs would have deemed acceptable. As the Payphone Commenters made clear, there are no CLECs viably using their own switches to economically provide service to payphone lines, so there is no CLEC cost data available. In any case, even if such data were available, given that the BOCs faulted the CLEC revenue data offered by the Payphone

²² BellSouth is simply wrong when it says that SBC and BellSouth ex partes relied upon by the Payphone Commenters were submitted "for different purposes," BellSouth Opp. at 46. Both the BellSouth and SBC ex partes explicitly compared cost and revenue data in order to demonstrate non-impairment. The *only* difference here is the outcome of the analysis.

Commenters as biased and self-serving, presumably the BOCs would have similarly objected to CLEC cost data. Simply put, the BOC data on which the Payphone Commenters relied, was not only the best available data, it was the *only* data. That data conclusively demonstrates impairment. If the BOCs were unwilling to accept that showing they bore the burden of producing additional data, which they failed to do.

C. The Payphone Commenters Properly Compared The Available Cost And Revenue Data

The BOCs' final attack on the Payphone Commenters' analysis is that the revenue and cost data are mismatched. *See* SBC Opp. at 31; Verizon Opp. at 33 n.30. That criticism, however, is nothing but a rehash of the Commission's (mistaken) concern that the Payphone Commenters "incorrectly compared costs based on state-specific estimates . . . with average estimated revenues not necessarily related to the actual revenues carriers could earn in those states," *TRO Remand Order* ¶ 222 n.611.

The Payphone Commenters fully addressed this concern in the Petition. As the Payphone Commenters made clear there, the revenue data did not consist of "average estimated revenues" but was the actual aggregated revenues per line of three CLECs serving a large percentage of the base of independent payphones. *See* Petition at 11-12. The Payphone Commenters also showed that of the 12 states from which the cost data was derived by the BOCs, 11 were among those from which the revenue data was derived. *See* Petition at 13. Given that 11 states out of 12 reflects a 91.6% overlap in the data sets, the BOCs can hardly complain that this represents "only" an "almost precise match."

In any case, while the 91.6% overlap showing would be sufficient on its own to rebut any concerns about mismatches in the data, the Payphone Commenters went on

to provide an additional analysis demonstrating that CLECs are impaired in serving the PSP market. The Payphone Commenters compared state- and region-specific revenue data with the specifically corresponding cost data from the SBC and BellSouth impairment analyses. *See* Petition at 13-14. For the SBC states of California and Texas, this analysis showed net negative margins of -\$22.59 and -\$20.41, respectively, which are remarkably in line with the region-wide negative margin of -\$17.19. *See id.* For the BellSouth states, the region-specific²³ cost and revenue comparison yielded a net negative margin of -\$3.93, almost exactly in line with the -\$4.25 negative net margin originally presented by the Payphone Commenters. *See id.* Tellingly, the BOCs do not so much as acknowledge this additional showing, much less offer any rebuttal.

As for Verizon's complaint that the data used by the Payphone Commenters "covers only 11 of the 50 states," Verizon Opp. at 33, the argument fails because, as the Payphone Commenters pointed out in the Petition, "the Commission can and should draw the inference from the substantial number of markets for which data is available to find that CLECs are impaired in all geographic markets in serving the PSP market segment." Petition at 14 n.21. The Commission found that such an approach was not only reasonable, but was necessary to comply with the D.C. Circuit's decision in *USTA II*, in analyzing impairment with respect to loops and transport. *See, e.g. TRO Remand Order* ¶ 87. The drawing of inferences is even more appropriate here, where (1) the Payphone Commenters used all of the states for which data was available; (2) those 11 states represent a very broad cross section of geographic areas, ranging from California

²³ The Payphone Commenters cannot be faulted for using the regional cost figure provided by BellSouth instead of state-specific costs given that (1) BellSouth itself used the region-wide figure in exactly the same way and (2) no other data was available.

and Texas to Alabama and Florida; and (3) no party (including Verizon) has so much as claimed, much less shown, that the subset is atypical.²⁴

Perhaps recognizing the weakness of their substantive position, the BOCs are reduced to making the frivolous procedural argument that that the Petition's showing that the revenue and cost data were properly matched was untimely. *See* Verizon Opp. at 31-32. According to Verizon, the Payphone Commenters are barred from "providing such new information" in a petition for reconsideration. *Id.* at 31. This argument fails for the simple reason that no new information was presented. All of the facts on which the Payphone Commenters relied in addressing the Commission's concerns regarding the mismatch of the data were taken from their comments or reply comments. While the *argument* made in the Petition concerning the data had not been made previously, it was unquestionably proper given that it was a direct response to the Commission's discussion of the data in the *TRO Remand Order*.²⁵

²⁴ Verizon makes much of the fact that the Payphone Commenters' marginal rate analysis, submitted in the December 8, 2004 Ex Parte shows a small positive net margin of \$5.42 in a single state. That margin, however, is not large enough to be meaningful and is a fraction of the margins that the BOCs say are available in the mass market, and which themselves do not support profitable entry.

²⁵ To the extent that the BOCs are contending that the Payphone Commenters were obligated to anticipate and respond to this concern in advance, the Payphone Commenters had no such duty.

CONCLUSION

For the reasons shown above and in the Petition, the Commission should partially reconsider the *TRO Remand Order* and find that CLECs are impaired without access to unbundled switching in serving the PSP market.

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Respectfully submitted,

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